STATE OF MICHIGAN

COURT OF APPEALS

FAMILY FARE, LLC, Plaintiff-Appellant,	UNPUBLISHED January 24, 2012
v	No. 301020 Otsego Circuit Court
UNIVERSAL LAND COMPANY, Defendant-Appellee.	LC No. 10-013462-CK

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

On March 5, 1999, plaintiff's predecessor by merger entered into an asset purchase agreement (APA) with Catt's Realty Company, Glen's Pharmacy, Inc., and Glen's Market, Inc. Pursuant to the APA, plaintiff was to purchase the name and non-building assets of the Glen's Market chain of grocery stores and enter into leases for the 23 buildings that housed the Glen's Market stores. Defendant, as owner of the only two buildings that were not owned by the other named sellers, was joined into the APA on a limited basis.

Section 2.13 of the APA is titled "Condition and Sufficiency of Assets" and reads:

> Except as disclosed in Schedule 2.13 of the Disclosure Schedule, the buildings, plants, structures, machinery, equipment, and other tangible property owned, leased, licensed or used in the Business by each of the Sellers (a) are structurally sound, are in good operating condition and repair and are adequate for the uses to which they are being put; (b) do not need maintenance or repairs except for ordinary, routine maintenance and repair that are not material in nature or cost; (c) are in material compliance with all applicable codes and other Legal Requirements; and (d) are sufficient for the continued conduct of the Business after the Closing in substantially the same manner as conducted before the closing.

In April of 2009, plaintiff discovered that the fire suppression system in three of the leased buildings did not meet applicable code requirements. On December 30, 2009, plaintiff filed suit against defendant, alleging a breach of § 2.13(c) of the APA. The complaint further

alleged that § 2.13(c) is an "express warranty of quality or fitness." Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that § 2.13(c) is not a warranty of quality or fitness, and that plaintiff's complaint was barred by the six-year statute of limitations for ordinary breach of contract claims.

The trial court issued a written decision granting defendant's motion for summary disposition. The trial court held that each of the four provisions of § 2.13 could be read independently of one another, and that while all four provisions related to the condition and sufficiency of the assets, not all four dealt with the condition and sufficiency of the quality or fitness of those assets. The trial court also held that a warranty of compliance with applicable laws and codes does not have the same legal effect as a warranty of quality and fitness, and as such, plaintiff's complaint was barred by the statute of limitations.

We review de novo a trial court's decision on a motion for summary disposition. *Zwiers v Growney*, 286 Mich App 38, 41; 778 NW2d 81 (2009). "Questions of statutory interpretation are also reviewed de novo on appeal." *Id*. We also review de novo a trial court's application of a statute of limitations. *Id*.

Plaintiff alleges that the trial court erred by failing to find § 2.13(c) of the APA to be a warranty of quality or fitness. We disagree.

The statute of limitations for a breach of contract claim is six years. MCL 600.5807(8). A breach of contract claim accrues and the statute of limitations begins to run at the time the breach occurs. *Blazer Foods, Inc v Rest Props, Inc*, 259 Mich App 241, 245-246; 673 NW2d 805 (2004). If, however, the alleged breach is of a warranty of quality or fitness, then the claim accrues at the time the breach is discovered or reasonably should have been discovered. MCL 600.5833. MCL 600.5833 does not define the terms "quality" and "fitness."

When interpreting a contract, we aim to determine the intent of the parties as reflected by the agreement as a whole and the plain language used by the parties. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). Contractual terms must be construed in context and in accordance with their commonly used meanings. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Where contractual language is unambiguous, we must interpret and enforce the contract as written. *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). We must "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

Plaintiff specifically brought a claim of breach under § 2.13(c) of the APA,[1] which reads in isolation:

[1] In fact, at the hearing below, plaintiff's counsel conceded that its claim was limited to § 2.13(c).

> Except as disclosed in Schedule 2.13 of the Disclosure Schedule, the buildings, plants, structures, machinery, equipment, and other tangible property owned, leased, licensed or used in the Business by each of the Sellers . . . (c) are in material compliance with all applicable codes and other Legal Requirements . . . .

This is a clear warranty of compliance with applicable laws and codes. It is neither a warranty that the tangible property is of good quality, nor a warranty that the tangible property is fit for any particular purpose. As noted by the trial court, tangible property that is of good quality and fit for its intended use may still be in violation of law and code, while property that complies with applicable codes and laws may still be of poor quality and unfit for its intended use.

Plaintiff attempts to circumvent this reality by asserting that § 2.13, taken as a whole, is a warranty of quality and fitness. We disagree. "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). In effect, plaintiff seeks the benefit of having § 2.13(c) interpreted as a warranty of quality or fitness while implicitly conceding that § 2.13(c) is not, in fact, a warranty of quality or fitness. This would not only frustrate the purpose of MCL 600.5833, but would also render the parties' decision to divide § 2.13 into distinct subsections superfluous. If the tangible property in question had been of poor quality or unfit for the purpose for which it was intended, plaintiff could have brought the action under § 2.13(a) for failure to be "structurally sound," "in good operating condition and repair," or "adequate for the uses to which they are being put." That is a true warranty of quality and fitness, and the fact that § 2.13(c) is located in the same section does not make it one by extension as well.

Affirmed.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Michael J. Kelly